

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

HOSPITAL GENERAL MENONITA

and Cases 24-CA-9051

24-CA-9202

FEDERACIÓN CENTRAL DE TRABAJADORES, 24-CA-9326
LOCAL 481, UFCW, AFL-CIO

Sheryl San Miguel, Esq., for the General Counsel.

Julio I. Lugo Munoz and Angel Munoz-Lespier, Esqs., of San Juan, PR, for the Respondent.

Angel Gonzalez, Representative, for the Charging Party.

Decision

Statement of the Case

David L. Evans, Administrative Law Judge. This case under the National Labor Relations Act (the Act) was tried before me in San Juan, Puerto Rico, on April 9, 2003. Federación Central de Trabajadores, Local 481, UFCW, AFL-CIO (the Union), filed charges under Section 10(b) of the Act in cases 24-CA-9051, 24-CA-9202 and 24-CA-9326 on September 27, 2001, March 7 and July 9, 2002, respectively. Those charges allege that Hospital General Menonita (the Respondent) has been engaging in unfair labor practices under Section 8(a)(1) and (3) of the Act.¹ The alleged unfair labor practices occurred during and after an organizational drive that the Union began during the summer of 2001 among a collective-bargaining unit of the Respondent's registered nurses (the unit). Simultaneously with its organizational drive among the registered nurses, the Union began an organizational drive among the Respondent's employees who worked in a collective-bargaining unit of technical employees and other employees (the technical unit). On October 1, the Union filed petitions for election with the National Labor Relations Board (the Board) seeking certification as the collective-bargaining representative of the employees in both units. A Board election was held for the employees in the technical unit on November 8; the Union lost that election by a vote of 40 to 35. On February 21, 2002, the Regional Director directed an election among the unit employees (again, the Respondent's registered nurses). The Respondent filed exceptions to the direction of election with the Board. On March 21, the Regional Director conducted an election among the unit employees, but she ordered that the ballots be impounded pending review of the Respondent's exceptions to the underlying direction of election. On April 9, the ballots of the unit employees were opened and counted. The tally revealed that a majority of the unit employees had cast ballots for the Union (49 of 94). The Respondent, however, filed objections to conduct affecting the results of the election (the objections). On June 4, a hearing officer of the Board conducted a hearing on the objections. On August 9, the hearing officer issued a report overruling the objections and certifying the Union as the collective-bargaining representative of the unit employees. On August 23, 2002, however, the Respondent filed exceptions to the hearing officer's report. The exceptions were still pending at time of trial before me, and they were still pending as of the issuance of this decision.

¹ Section 7 of the Act provides that employees "shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 8(a)(1) provides that it is an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." Section 8(a)(3) provides that it is an unfair labor practice for an employer "by discrimination ... to encourage or discourage membership in any labor organization."

On October 31, 2002, after investigation of the charges that had been filed by the Union, the General Counsel issued a complaint alleging that, in violation of Section 8(a)(1),

the Respondent has, since May 1, 2001, posted and maintained a set of no-solicitation and no-distribution rules that have unlawfully interfered with its employees' rights under Section 7 of the Act. The complaint further alleges that, on or about January 16, 2002, the Respondent posted, and thereafter has maintained, a second set of no-solicitation and no-distribution rules that have also unlawfully interfered with its employees' Section 7 rights. The complaint further alleges that, about May 22, 2002, in violation of Section 8(a)(3), the Respondent announced that, retroactive to May 1, 2002, all employees except the unit employees would receive the employment benefit of a paid holiday on each employee's birthday (the birthday leave benefit). The complaint further alleges that in June the Respondent and the Union reached a settlement agreement (the settlement agreement) whereby the Respondent would grant the birthday leave benefit to the unit employees. The complaint further alleges, however, that, in July 2002, in further violation of Section 8(a)(3), the Respondent reneged on its commitment under the settlement agreement. At trial, over objections by the Respondent, I further allowed the General Counsel to amend the complaint to allege that, if the Board denies the Respondent's exceptions to the hearing officer's report and issuance of a certification of the Union as the collective-bargaining representative of the unit employees, the Respondent has therefore been, and is, in violation of Section 8(a)(5) of the Act by its reneging on its commitment under the settlement agreement.² Although admitting that jurisdiction of this matter is properly before the Board, the Respondent denies the commission of any unfair labor practices. The Respondent further denies that the complaint's Section 8(a)(5) allegation is supported by any charge that has been filed by the Union.

Upon the testimony and exhibits entered at trial, and after consideration of the briefs that have been filed, I make and enter the following findings of fact and conclusions of law.

I. Jurisdiction

As it admits, at all material times the Respondent, a corporation with an office and place of business in Cayey, Puerto Rico, herein called the Respondent's facility, has been engaged in the operation of a hospital providing inpatient and outpatient medical care services. In conducting those business operations, the Respondent has annually derived gross revenues in excess of \$250,000 and the Respondent has annually purchased and received at its facility goods and materials valued in excess of \$50,000 directly from suppliers located outside Puerto Rico. Therefore, at all material times the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act, and it has been a health care institution within the meaning of Section 2(14) of the Act. As the Respondent further admits, the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. The Alleged Unfair Labor Practices

A. Facts

1. The no-solicitation and no-distribution rules

The Respondent is a 118-bed hospital that has a total employee complement of about 600. As the Respondent admits, since 1992 it has maintained the following employment rule:

REGULATION REGARDING SOLICITATION AND DISTRIBUTION

Through this Regulation, the Hospital General Menonita and all its dependencies regulate all types of solicitation and distribution activities that ordinarily interfere with the work environment in the institution and with the peaceful atmosphere at the patients' care areas and other areas set aside for the patients' relatives. The same shall be applied uniformly and without distinction of persons, groups, or nature of the activities. The same shall be divulged among all of the employees.

² Section 8(a)(5) provides that it is an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees"

SOLICITATION = By solicitation, it is understood that is all activity aimed at promoting the employees participation in any type of associations and organizations, carry out campaigns, meetings and/or speeches, including the discussion of the advantages and disadvantages of belonging to said groups or to participate in said campaigns or meetings, the persuasion or verbal invitation in general terms and the distribution of authorization cards to join said associations or organizations.

SOLICITATION BY THE EMPLOYEES = Any kind of solicitation will not be permitted from the employees of the institution in the hospital premises or in any working area or in areas designated for the care and treatment of patients or wherever it is necessary to guarantee a peaceful atmosphere to the patients or relatives, whether it is during or outside of working hours.

...
DISTRIBUTION = Distribution is understood to be the dissemination of printed literature of any nature and about any subject, pamphlets, leaflets, notes or loose leafs or any other material of permanent nature, to be divulged for the purposes of reading and retention.

DISTRIBUTION BY THE EMPLOYEES = It remains prohibited the distribution and receipt of materials (as previously defined) at all times, in the areas designated for the care and treatment of patients or wherever it is necessary to guarantee a peaceful atmosphere to patients and relatives.

...
A violation to these rules may constitute just cause for a severe disciplinary measure, including the permanent separation from employment and salary.

Pedro Melendez, the Respondent's administrator, testified that the 1992 rules were instituted by the Respondent in 1992, and copies of them have been regularly distributed to new employees. Melendez further testified that copies of these rules were posted on employee bulletin boards after the 2 petitions for elections were filed by the Union on October 1. Melendez testified that the postings were ordered because management had received complaints about employees' soliciting Union authorization cards in patient-care areas such as patients' rooms. The complaint (as amended at trial) alleges that by the Respondent's maintenance of these rules since May 1, 2001, and by its posting of these rules on or about November 3, 2001, it has violated Section 8(a)(1).

On or about January 16, 2002, Respondent posted and distributed to its employees a second set of no-solicitation and no-distribution rules:

SOLICITATION AND DISTRIBUTION OF PRINTED MATERIAL

Fellow workers are not allowed to solicit from another co-workers, patient or visitor, at any time, be it during working hours or not, funds or membership for any type of organization or to purchase or be dedicated to the sale of goods and services and/or distribute literature in areas strictly dedicated to patient care. An area that is strictly for patient care is defined as their rooms or any other place where they receive any type of treatment, hallways adjacent to said areas, reception places at patient floors used by them and elevators or stairs that are frequently used to transport patients. In those areas not strictly for patient care, employees may not solicit funds or membership for any type of organization, nor distribute any type of literature during their working hours. The term "working hours" does not include authorized rest periods, such as meal periods or short term periods for refreshments (coffee break.)(Underlining is original.) The complaint alleges that by this posting and distribution the Respondent also violated Section 8(a)(1). The Respondent contends that the issuance of its second set of rules canceled the first set and that neither set of rules violated the Act because they were not intended to interfere with employees' concerted or union activities that are protected by Section 7 and because they would not have had that effect.

2. The birthday leave benefit

On May 22, 2002, the Respondent's board of directors announced to the employees that, retroactive to May 1, all employees except its registered nurses would receive paid leave on their birthdays. The announcement stated that the denial to the registered nurses was "[d]ue to the existing legal situation."

On June 7, the Union filed a charge in case 24-CA-9306 alleging that the Respondent had violated Section 8(a)(1) and (3) “by discriminating against the [petitioned for] registered nurses by unlawfully denying them their birthday [leave] as provided to all other employees because of their support for [the Union].”

By letter dated June 12, Melendez wrote Union representative Angel Gonzalez that:

[W]ith the purpose of avoiding unnecessary controversies, the Hospital is willing to grant that benefit to the registered personnel that work in our Institution, as long as the Union promises to withdraw the unfair labor practice charge that it filed, as well as not file an unfair labor practice charge because of the granting of said benefit.

The above-mentioned constitutes a settlement offer which does not imply acceptance, on behalf of the Hospital, of having incurred in a violation of any law. On the contrary, we believe that this offer turns out to be beneficial for the registered [nurses] personnel who work in our Institution.

Melendez testified that, after sending this letter, Luisa I. Acevedo, the president of the Union, telephoned him. According to Melendez, after Acevedo told him that she was in agreement with Melendez’s settlement proposal, he then told Acevedo:

... to put it in writing but that we wanted to clarify that we had not violated, that we had not encouraged any unfair labor practice and that I wanted that in writing, that after awarding that fringe benefit, we would not be charged additionally with unfair labor practice.

Acevedo did not deny this testimony.

By letter dated June 19, Acevedo wrote Melendez that:

I acknowledge receipt of your letter, dated June 12 of this year, addressed to my co-worker, Angel González. In the same, you offer us to extend the benefit of the birthday day off to the registered nurses personnel as a settlement offer in the case of the National Labor Relations Board.

We are accepting your offer and we will proceed to withdraw the charge for the unfair labor practices.

By letter dated June 20, Melendez replied to Acevedo that:

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5 As we had expressed in our letter, dated June 12 of this year, the charge filed by the Union does not have any legal basis, due to the fact that the Hospital acted in accordance with the law, by not providing the benefit regarding the birthday to the registered nurses. In fact, the Hospital was barred by law from doing it.

10 In our letter, we requested that in addition to withdrawing the groundless filed charge, to assure or express to us in writing that you will not file an unfair labor practice charge because the Hospital extended said benefit to the registered personnel.

In this manner, we understand that this matter will be clear.

15 By letter dated June 25, the Regional Director notified the parties that she had approved the Union's withdrawal of the charge in case 24-CA-9306

Acevedo testified that on June 26 she composed and signed, and she had sent by regular mail to Melendez, a letter stating:

20 We reiterate our position that everything that benefits our employees is welcomed by our organization. Obviously, it would be illogical for us to file a charge on aspects that we specifically settled with management.

25 Sandra Lopez, Acevedo's secretary, testified that she did, in fact, properly address and mail Acevedo's June 26 letter on that date. Lopez further denied that the envelope of that letter was ever returned to the Union by the Postal Service. Nevertheless, Melendez testified that he received no response to his June 20 letter.

30 Also on June 26, the Union distributed to the Respondent's employees a handbill stating:

Menonita yields before the pressure from the Federation.

35 Another victory for the Registered Nurses Personnel from Hospital Menonita in Cayey. The Hospital Administration changed its discrimination policy against the Registered Nurses with regard to the granting of the birthday as a day off. This acquired right has been reinstated for the Registered Nurses Personnel.

For that reason, the charge that we had filed before the National Labor Relations Board is no longer in effect and we are withdrawing it.

We hope that the Administration does not repeat any discriminatory and unfair acts against the Registered Nurses Personnel again.

40 By letter dated June 27, Melendez informed Acevedo that:

45 Yesterday, you distributed a leaflet where you accuse the Hospital of having established a discriminatory policy against the registered personnel by not having granted the birthday as a day off.

Obviously, the Union's actions of presenting said information incorrectly and not based on the facts of what really happened, prevents the Hospital from trusting the Union's actions and much less, in that the Union really has the well being of the employees in mind.

50 Due to the lack of candor demonstrated by the Union with regard to this matter, we are informing you that the Hospital will strictly comply with the provisions of the law and we are barred from extending the birthdays benefit to the registered nurses personnel.

Acevedo testified that on July 8, when she received Melendez's June 27 letter, she called Melendez. According to Acevedo:

Well, Mr. Melendez told me that they were withdrawing from the settlement as a result of a so-called flyer that the Union had been disseminating. They hadn't like[ed] that at all and that they understood that that was a breach of the agreement and that they were withdrawing from it.

Acevedo further testified that Melendez told her that if she wanted to know anything else, she should contact the Respondent's attorneys. Melendez did not deny Acevedo's testimony about this conversation. After the conversation, Acevedo caused to be filed the instant charge in case 24-CA-9326, the substance of which is the same as the previously withdrawn charge in case 24-CA-9306.

Melendez testified that the Respondent's board of directors had decided to grant the birthday leave benefit at an April 23 meeting. At that meeting Melendez told the board of directors that to grant the birthday leave benefit to the registered nurses while they were subject to the Union's petition for election would have been an unfair labor practice. For that reason only, Melendez further testified, the board of directors decided to withhold the benefit from the unit employees. On cross-examination, however, Melendez identified the minutes of the April 23 meeting which state:

Mr. Torres [the Respondent's CEO] reports that the human resource officers and the corporate group are recommending that employees receive as a fringe benefit their birthday as a day off except for the group of registered nurses that are joining the Union. The corporate cost of this benefit will amount to \$464,000 annually. The motion was seconded and approved.

When asked on cross-examination, Melendez testified that he did not know why the meeting's minutes did not reflect that the Respondent's board of directors decided not to grant the birthday leave benefit to the unit employees because of the reason that he had given to them, that to have done so would have been an unfair labor practice.

The complaint alleges that the Respondent violated Section 8(a)(3) by withholding in May the birthday leave benefit from the unit employees and that it separately violated Section 8(a)(3) by reneging in July on its promise to grant the benefit. The complaint further alleges that the Respondent's alleged reneging on its promise to grant the birthday leave benefit violated Section 8(a)(5). The Respondent answers that, in fact, granting the birthday leave benefit to the unit employees would have been an unfair labor practice. The Respondent further contends that, as well as being conditional upon the Union's withdrawing the charge in case 24-CA-9306, its June 12 offer to grant the benefit was conditional upon the Union's assuring it, in writing, that it would not file another unfair labor practice charge if the Respondent granted the benefit. The Respondent contends that it did not receive any such assurance and that, therefore, it did not renege on a commitment to grant the benefit. Finally, the Respondent contends that it cannot be found in violation of Section 8(a)(5) by refusing to grant the birthday leave benefit because the Union has not been finally certified by the Board as the collective-bargaining representative of the unit employees and that, in any event, there is no Section 8(a)(5) charge to support that allegation of the complaint.

B. Analysis and Conclusions

1. The no-solicitation and no-distribution rules

5 In *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978), the Supreme Court stated that “the right of employees to self-organize and bargain collectively established by Section 7 ... necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite.” And in *Eastex, Inc. v. NLRB*, 437 U.S. 556, 574 (1978), the Court upheld the Board’s view that the workplace “is a particularly appropriate place for the distribution of Section 7 material, because it ‘is the one place where [employees] clearly share common interests and where they traditionally seek to persuade fellow workers in matters affecting their union organizational life.’” (Quoting *Gale Products*, 142 NLRB 1246, 1249 (1963).) Employees’ Section 7 rights to solicit their fellow employees and to distribute materials to them in the workplace, of course, are not unlimited. Generally, employers may prohibit employee solicitations for unions during work time in work areas, and employers may prohibit distribution of prounion materials in work areas at all times, if, in both cases, they do so non-discriminatorily. (That is, the employers do not allow solicitations and distributions that are not related to union organization while prohibiting those that are.) Therefore, rules that have the effect of prohibiting work-area solicitations during work time or the effect of prohibiting distributions in work areas at any time are not presumptively invalid. However, employer rules that have the effect³ of prohibiting solicitations during non-work time, or have the effect of prohibiting distributions in non-work areas, are presumptively invalid. These general presumptions of invalidity, however, do not precisely apply to hospitals. Because of patients’ needs, hospital employers may prohibit all employee solicitations and distributions, including those on non-work time, in immediate patient care areas such as patients’ rooms, operating rooms and places where patients receive diagnostic or treatment services, such as x-ray and therapy areas. *St. John’s Hospital*, 222 NLRB 1150, 1151 (1973). This is because:

Solicitation at any time in those areas might be unsettling to the patients—particularly those who are seriously ill and thus need quiet and peace of mind. Consequently, banning solicitation on nonworking time in such areas as described above would seem justified in hospitals and to the extent that [an employer’s] rule prohibits such activity in those areas it is valid.

Id. The Supreme Court in *Beth Israel*, supra, approved this reasoning and rule of the Board stating: We therefore hold that the Board’s general approach of requiring health-care facilities to permit employee solicitation and distribution during nonworking time in nonworking areas, where the facility has not justified the prohibitions as necessary to avoid disruption of health-care operations or disturbance of patients, is consistent with the Act.

437 U.S. 483 at 508. Therefore, for areas other than patients’ rooms, operating rooms and places where patients receive diagnostic or treatment services, such as x-ray and therapy areas, it is the burden of the employing hospital to show that prohibitions of non-work-time solicitations, and prohibitions of distributions in non-work areas, are justified by patients’ needs. The placement of this burden on the employer was reaffirmed in *N.L.R.B. v. Baptist Hospital*, 442 U.S. 773, 782, n.11 (1979), where the Court stated that “... a hospital may overcome the presumption [of invalidity] by showing that solicitation is likely either to disrupt patient care or disturb patients.”⁴

In this case, the Respondent’s 1992 rules prohibit solicitations and distributions “wherever it is necessary to guarantee a peaceful atmosphere to the patients or relatives, whether it is during or outside of working hours.” No attempt is made to describe what areas are “necessary” to guarantee a “peaceful atmosphere.” The conclusion that a reasonable employee would necessarily draw from these rules is that

³ The employer’s motivation in creating a no-solicitation or no-distribution rule is irrelevant. *Golub Corporation*, 338 NLRB No. 62, sl. op. 2 (2002).

⁴ Conversely, it is not the burden of a union to show that areas outside of patients’ rooms and operating rooms, or areas outside places where patients receive diagnostic or treatment services, are not patient care areas where solicitations and distributions may be prohibited at all times.

all solicitations and distributions on the Respondent's property are prohibited at all times. The Respondent, however, introduced no evidence that such proscriptions, as they apply to areas other than patients' rooms, operating rooms and places where patients receive diagnostic or treatment services, were necessary to prevent disturbing patients or interrupting patient care. The 1992 rules are therefore
 5 unlawfully broad, and, as alleged in the complaint, by maintaining those rules since at least May 1, 1991,⁵ and by posting those rules on or about November 3, 1991, the Respondent has violated Section 8(a)(1).

Contrary to the argument of the Respondent, its issuance of the January 2002 rules did not, expressly or otherwise, repudiate the 1992 rules or remedy their effect. This is because, to be effective, a
 10 repudiation of unlawful conduct "must be 'timely,' 'unambiguous,' 'specific in nature to the coercive conduct,' and 'free from other proscribed illegal conduct.' ... Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. ... And, finally, the Board has pointed out that such repudiation or
 15 disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights."⁶ None of the requisites for an effective repudiation of the unlawful 1992 rules is present in the January 2002 rules. More importantly, the January 2002 rules themselves, as the complaint further alleges, violated the Act.

The rules that the Respondent distributed in January 2002 do at least refer to "areas strictly dedicated
 20 to patient care," but the Respondent simultaneously informs employees that such areas, in its view, include, as well as patients' rooms, operating rooms and diagnostic and treatment areas: "hallways adjacent to said areas, reception places at patient floors used by them and elevators or stairs that are frequently used to transport patients." These areas, of course, are beyond the presumptive patient care
 25 areas; therefore, under the above-cited cases, it was the burden of the Respondent to show that non-work-time solicitations and distributions in those other areas were likely either to disrupt patient care or disturb patients. The Respondent adduced no such evidence, and it must be held that its January no-solicitation and no-distribution rules were also unlawfully broad and violative of Section 8(a)(1).⁷

2. The withholding of the birthday leave benefit

30 An employer is obliged to carry out its benefit-setting practices during a union campaign in the same manner it would have done in the absence of the union.⁸ The minutes of the April 26 meeting of the Respondent's board of directors state that the birthday leave benefit is to be received by all employees "except for the group of registered nurses that are joining the Union." The protestations and explanations
 35 of Melendez at trial notwithstanding, I find that this, the fact that the registered nurses were "joining the Union," was the true reason that the birthday leave benefit was withheld from them. Therefore, a violation of Section 8(a)(3) is clearly established by the Respondent's withholding of that benefit from the unit employees on and after May 1.

40 I further agree with the General Counsel that, even without this clear evidence of unlawful motivation, a violation of Section 8(a)(3) in the Respondent's conduct of withholding the birthday leave benefit from the unit employees has been established. In *NLRB v. Great Dane Trailers*, 388 U.S. 26, 33-34 (1967) the Supreme Court held that if "it can reasonably be concluded that the employer's discriminatory conduct was 'inherently destructive' of important employee rights, no proof of an
 45 antiunion motivation is needed." 388 U.S. at 34. This is so because "such conduct carries its own indicia of intent." *Id.* Upon proof of such conduct, the burden shifts to the employer who, in order to avoid the finding of a Section 8(a)(3) violation, must prove "legitimate and substantial business justifications for

⁵ Under Section 10(b) of the Act, this date is well within the 6-month limitations period from the filing of the original charge. The fact that the 1992 rules were originally promulgated outside the limitations period does not defeat this allegation. Maintenance of an unlawfully broad rule within the Section 10(b) period, even without any enforcement of the rule, violates the Act. *Varo, Inc.*, 172 NLRB 2062 (1968).

⁶ *Passavant Memorial Area Hospital*, 237 NLRB 138 (1978), and cases quoted therein (footnotes omitted).

⁷ See *Brockton Hospital*, 333 NLRB No. 165 (2001), *enfd.* in relevant part, 294 F.3d 100 (D.C. Cir. 2002), where prohibitions against all solicitations and distributions in "halls and corridors used by patients" were held to be unlawful.

⁸ *McCormick Longmeadow Stone Co., Inc.*, 158 NLRB 1237, 1243 (1966).

the conduct,” in order to escape liability under Section 8(a)(3). Id. Here, the Respondent’s conduct was plainly discriminatory; simply stated, the Respondent granted the birthday leave benefit to employees in the technical unit who had recently rejected the Union, and it granted the benefit to all other employees who were not the subject of a Union organizational attempt, but it denied the benefit to the employees who had accepted the Union, as evidenced by their votes in the Board election. Such discrimination is plainly destructive of employee rights,⁹ and the principles of *Great Dane Trailers* apply. The Respondent, however, has advanced no legitimate or substantial business consideration to justify its discriminatory action; therefore, a Section 8(a)(3) violation necessarily lies.

Instead of a business consideration, the Respondent has advanced only a supposed legal consideration for its conduct. The Respondent contends that, as Melendez testified, the reason for withholding the birthday leave benefit from the unit employees was fear of an unfair labor practice charge. Specifically, the Respondent contends that it feared a Section 8(a)(5) prosecution if the Union ever became certified as the collective-bargaining representative of the unit employees. In this argument, the Respondent relies on the theory of *Mike O’Connor Chevrolet*, 209 NLRB 701, 703 (1974), which held:

[A]bsent compelling economic considerations for doing so, an employer acts at its peril in making changes in terms and conditions of employment during the period that objections to an election are pending and the final determination has not yet been made. And where the final determination on the objections results in the certification of a representative, the Board has held the employer to have violated Section 8(a)(5) and (1) for having made such unilateral changes.

Relying on this holding, the Respondent presents itself as being on the horns of a dilemma; if it grants the birthday leave benefit to the unit employees, it will be prosecuted under a theory of *Mike O’Connor Chevrolet* for violating Section 8(a)(5) if the Union ultimately becomes certified; but if it withholds the birthday leave benefit to the unit employees, it will be (and has been) prosecuted for violating Section 8(a)(3). No such dilemma exists. As stated in *McDonnell Douglas Aerospace Services Company*, 326 NLRB No. 151 (1998), fn. 1:

In general, during a representation campaign an employer must “proceed as he would have done had the union not been on the scene.” *The Gates Rubber Company*, 182 NLRB 95 (1970); *Wells Fargo Alarm Services, a Division of Baker Industries Inc.*, 224 NLRB 1111, 1113 (1976). When an employer, prior to a union campaign, has an established wage increase policy, the suspension of that policy during the union campaign will normally be found to violate Sec. 8(a)(3) unless the employer postpones the increases only for the duration of the campaign and informs the employees at the time of the postponement that the sole reason for its action is to avoid the appearance that [it] seeks to intervene in the election, and the Board finds that this in fact was its reason. *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980); *Progressive Supermarkets, Inc.*, 259 NLRB 512 (1981). If the employer does so inform the employees, and cannot be said to have placed the onus for postponement on the union, the postponement will not be found to violate the Act. See *Uarco Incorporated*, 169 NLRB 1153 (1968).

This case is in the same posture. The birthday leave benefit policy was not established before the Union’s campaign. But the Respondent, as readily as the employers in above-cited cases, could have told the unit employees that, in order to avoid unfair labor practice charges or allegations of interference with a possible rerun of the Board election, it was withholding the benefit, but only until its objections to the election were finally resolved by the Board. If it had done so, it would have avoided prosecution under Section 8(a)(3) or Section 8(a)(5).

The violation of Section 8(a)(3) was complete on May 1, the effective date of the Respondent’s May 22 announcement that the unit employees would be deprived of the birthday leave benefit. At that point, the Respondent was under a legal obligation to remedy the violation, and it was not entitled thereafter to

⁹ *International Harvester Co.*, 169 NLRB 787, 792 (1968), *Hanover House Industries, Inc.*, 233 NLRB 164, 170 (1977); *Honeywell, Inc.*, 318 NLRB 637 (1995)

make the Union jump through the hoop of submitting a withdrawal of the charge in case 24-CA-9306, or jump through the hoop of submitting a written promise not to file future charges, before it complied with its legal obligation. Therefore, the remaining Section 8(a)(3) allegations of the complaint are actually surplusage, but I shall address them for possible purposes of review.

Melendez testified that when Acevedo telephoned him to accept his June 12 offer, he made clear to Acevedo that, as well as a withdrawal of the unfair labor practice charge in case 24-CA-9306, a condition of the Respondent's offer was that the Union submit a written promise not to file future unfair labor practice charges when the Respondent granted the birthday leave benefit pursuant to the settlement agreement. Acevedo did not deny this testimony, and I accept it as true. In her letter of June 19, Acevedo did promise to withdraw the charge, but she did not express a promise not to file future charges if the birthday leave benefit were granted by the Respondent. By letter dated June 20, Melendez, again, stated that his letter of June 12 also required a promise not to file future unfair labor practice charges. Acevedo testified that on June 26, upon receipt of Melendez's June 20 letter, she composed and signed a letter containing this second promise. Lopez testified that she mailed that letter, also on June 26, and Lopez also testified that the envelope was never returned to the Union. Melendez testified that he did not receive that letter and the Respondent contends that the failure to receive a written promise that no future unfair labor practice charge would be filed is the sole reason that Melendez, in his June 27 letter, withdrew his offer to grant the birthday leave benefit.

I do not believe Melendez's testimony that he never received Acevedo's June 26 letter; moreover, I find that Melendez did receive the letter, if not before he sent his letter of June 27, at least shortly thereafter. By letter dated June 27, Melendez informed Acevedo that the Respondent was not going to grant the birthday leave benefit to the unit employees because of "the lack of candor demonstrated by the Union with regard to" the handbill that the Union had distributed on June 26. That handbill had accused the Respondent of unlawful discrimination in its refusal to grant the birthday leave benefit to the unit employees when it granted it to the other employees. Assuming that Melendez had not yet received Acevedo's June 26 letter by the time that he sent his June 27 letter, it is nevertheless to be noted that Melendez did not tell Acevedo in his June 27 letter that the Respondent was thereafter refusing to grant the birthday leave benefit, even in part, because he had not received the Union's written promise not to file future unfair labor practice charges. If he had done so, the Union undoubtedly would have replied with another written assurance that it would not file a future charge if the Respondent thereafter granted the birthday leave benefit. And Melendez undoubtedly realized that, and that is why he cited only the handbill in his June 27 letter. Finally, Melendez did not deny Acevedo's testimony that on July 8 Melendez told her only that "they were withdrawing from the settlement as a result of a so-called flyer that the Union had been disseminating. They hadn't like[ed] that at all and that they understood that that was a breach of the agreement and that they were withdrawing from it." This undenied testimony was also credible, and it constitutes a compelling admission that the Respondent withdrew from the settlement agreement, not because of the failure to receive some promise, but because Melendez had become infuriated by the Union's June 26 handbill. In summary, the Respondent's alleged failure to receive the Union's promise not to file future unfair labor practice charges was nothing more than a mere afterthought. I therefore find that the Respondent withheld the birthday leave benefit from the unit employees as an act of recrimination against them for their protected union activities, the last of which was the distribution of the Union's June 26 handbill. For this reason, as well as those discussed above, I find and conclude that the Respondent violated Section 8(a)(3) by withholding from the unit employees the birthday leave benefit on and after May 1, 2002.

3. The Section 8(a)(5) Allegation

The General Counsel also alleges that, by withholding the birthday leave benefit from the unit employees after it had agreed to grant that benefit, the Respondent also violated Section 8(a)(5). Citing *Mike O'Connor Chevrolet*, supra, the General Counsel argues that, upon final certification of the Union as the collective-bargaining representative of the unit employees by the Board, the Respondent will be retroactively guilty of the unfair labor practice because it unilaterally changed a term or condition of

employment of the employees without bargaining with the Union. For the reasons stated above, I find that the birthday leave benefit had been a term of employment of the unit employees since May 1. And I agree that, if the Board ultimately certifies the Union as the collective-bargaining representative of the unit employees, the Respondent may be held to have violated Section 8(a)(5) by its action in regard to the birthday leave benefit. Nevertheless, the Board has not yet finally certified the Union as the collective-bargaining representative of the unit employees, and it may well never do so. Therefore, at this point, the necessary premise of a Section 8(a)(5) finding, the majority status of the Union, is missing. Accordingly, I must at this point recommend dismissal of the Section 8(a)(5) allegation and leave the matter to the Board ultimately to decide upon exceptions to this decision that may be filed by the General Counsel.¹⁰

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended¹¹

ORDER

The Respondent, Hospital General Menonita, of Cayey, Puerto Rico, its officers, agents, successors and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining overly broad no-solicitation/no-distribution rules.

(b) Withholding from its employees birthday leave benefits, or any other benefits, because they have become or remained members of the Union or because they have given assistance or support to it.

(c) In any like or related manner interfering with, restraining or coercing its employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind any and all directives to employees which prohibit solicitation during nonworking time in nonpatient care areas of the hospital and/or which prohibit distribution during nonworking time in nonworking, nonpatient care areas of the hospital, and notify its employees in writing that it has done so.

(b) Grant to its employees, with interest, the birthday leave benefit that it has withheld from them since on or about May 1, 2002.¹²

(c) Within 14 days after service by the Region, post at its Cayey, Puerto Rico, facilities copies of the attached notice marked "Appendix."¹³ Copies of the notice, in both the English and Spanish languages, on forms provided by the Regional Director for Region 24, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees

¹⁰ For this reason, I need not pass on the Respondent's further contention that the Section 8(a)(5) allegation of the complaint must be dismissed because there is no charge to support it.

¹¹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

¹² Interest is to be computed as provided in *Isis Plumbing & Heating Co.*, 138 NLRB 716.

¹³ If this Order is enforced by a judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

and former employees employed by the Respondent at any time since May 1, 2001, the approximate date of the first unfair labor practice found herein.

- 5 (e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated at Washington, D.C.

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David L. Evans
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD (the Board) An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW SECTION 7 OF THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO

Form, join or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT withhold from you a birthday leave benefit, or any other benefit of employment, because you have become or remained members of Federación Central de Trabajadores, Local 481, UFCW, AFL-CIO, or because you have given assistance or support to that labor organization.

WE WILL NOT promulgate or maintain any directives which prohibit solicitation by employees during their nonworking time in nonpatient care areas of the hospital and/or which prohibit distribution by employees during their nonworking time in nonworking, nonpatient care areas of the hospital.

WE WILL NOT in any like or related manner interfere with, restrain or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind any written directives which prohibit solicitation by employees during their nonworking time in nonpatient care areas of the hospital and/or which prohibit distribution by employees during their nonworking time in nonworking, nonpatient care areas of the hospital.

WE WILL make whole, with interest, all employees whom we have deprived of a birthday leave benefit since on or after May 1, 2002.

HOSPITAL GENERAL MENONITA

(Representative)

(Title)

Dated: _____

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office:

La Torre de Plaza, Suite 1002
525 F.D. Roosevelt Avenue
San Juan, PR 00918-1002

You may also obtain information from the Board's Web site: www.nlr.gov.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (787) 766-5377.